ORIGINAL (2)

No. 96-548

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

ROCHELLE ARDALL CROWDER AND HORACE LEE DAVIS, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether extrinsic evidence of prior drug sales is admissible under Federal Rule of Evidence 404(b) to prove the elements of intent and knowledge in a prosecution for possession with intent to distribute drugs where the defendant affirmatively removes those elements by unequivocally and completely conceding them, waiving his right to trial on them, and agreeing that the jury is to be instructed the government need not prove those elements and that it "must convict" if it finds that the government has proved that the defendant possessed the drugs.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 87 F.3d 1405.

JURISDICTION

The judgment of the court of appeals, sitting en banc, was entered on July 9, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Respondents hereby incorporate by reference the court of appeals's statement of the facts in the opinion below. Pet. App. 3a-6a.

Finding that the district court erroneously had admitted prior bad acts evidence to prove intent and knowledge notwithstanding respondent Davis's willingness to waive his right to require the government to prove those elements, the court of appeals reversed his conviction and remanded his case for a new trial. As to respondent Crowder, because the district court admitted the bad acts evidence to show intent to distribute, which he had offered to concede, as well as knowledge of drug dealing, which he had not conceded, the court of appeals remanded his case for the trial court to weigh under Federal Rule of Evidence 403 the value of the bad acts evidence solely to prove knowledge of drug dealing against its prejudicial effect. Pet. App. 2a-3a.

The majority of the en banc court held that prior bad acts evidence offered solely to prove certain elements of a crime is

inadmissible under Federal Rule of Evidence 404(b) where the defendant unequivocally concedes those elements and agrees to a jury instruction directing that the jury must find the elements proven. Pet. App. 2a-33a. As Judge Tatel, writing for the majority, observed, the exclusion of the prior bad acts evidence is justified because the

> defendant's offer to concede knowledge and intent combined with an explicit jury instruction that the Government no longer needs to prove either element gives the Government everything the evidence could show with respect to those two elements, doing so without risk that the jury will use the evidence for impermissible propensity purposes.

Pet. App. 9a-10a.

Devoid of any non-propensity purpose in light of the unequivocal concession and mandatory jury instruction, the bad acts evidence is inadmissible under the first sentence of Rule 404(b) because its only purpose would be the impermissible one of proving bad character. Id. at 10a. The majority made clear that its holding was "[g]rounded in Rule 404(b)," which "establishes a separate standard for bad acts evidence[,]" and was "faithful to the plain language of [the rule] as well as to its purpose [of] protecting defendants from the prejudice inherent in bad acts evidence." Id. at 10a, 20a.

In responding to fears expressed by the dissent, the majority noted that its holding is limited to extrinsic evidence offered under Rule 404(b) and does not "encompass non-bad acts evidence intrinsic to a crime such as the details of a victim's wounds in an assault case . . .." Id. at 20a. The majority disputed the

contention that its holding would undermine the prosecution's legitimate trial strategies and right to present its case, noting:

> The dissent does not articulate exactly how the Government's inability to introduce extrinsic bad acts evidence to prove knowledge or intent could affect its case, and with good reason -- it will not. If the jury fails to find possession beyond a reasonable doubt, then the Government's inability to introduce bad acts evidence for the other two elements would not affect its case at all unless the jury used the evidence to show possession through propensity, a purpose explicitly prohibited by the first sentence of Rule 404(b). If the jury does find possession beyond a reasonable doubt, the only way the Government's inability to introduce bad acts evidence could affect the outcome is if the jury ignores its instruction that the Government need only prove possession and acquits the defendant because the Government failed to prove intent and knowledge beyond a reasonable doubt.

Id. at 21a.

Finally, the majority found that the two cases upon which the dissent relied most heavily, Estelle v. McGuire, 502 U.S. 62, 69 (1991), and Mathews v. United States, 485 U.S. 58, 65 (1988), were inapposite because neither one involved an explicit and unequivocal defense concession of an element. Id. at 20a. The majority also distinguished this Court's decision in Singer v. United States, 380 U.S. 24 (1965), on the ground that Singer only restricts the ability of criminal defendants to waive a jury trial in favor of a bench trial without the government's consent, and "does not limit [defendants'] ability to waive a jury trial altogether." Id. at 23a.

Judge Silberman and Judge Rogers filed separate concurring opinions. Judge Silberman, joined by Judges Buckley and Williams,

agreed with the majority's construction of Rule 404(b), in light of the plain meaning of its language, and joined the majority's holding that prior bad acts evidence is inadmissible under that rule if the purpose for which it is offered "is not at issue in the case." Id. at 24a (Silberman, J., concurring). Judge Rogers's concurrence emphasized the unique facts of this case, given the defendants' agreement to a "must convict" jury instruction. Judge Rogers noted that this factor made the case "less difficult" and "change[d] the analysis by permitting the court to bypass several difficult questions. . . ." Id. at 26a (Rogers, J., concurring). Judge Rogers observed that the court had found no other opinion addressing this issue that involved or required a "must convict" jury instruction. Id. at 30a n.8.

Judge Randolph's dissent, joined by Judges Ginsburg, Sentelle, and Henderson, argued that the majority's holding was inconsistent with Estelle, Mathews, and Singer, undermined the government's right to present its case, and left a number of unanswered questions for district courts to sort through as they practically apply the court of appeals's ruling. Id. at 34a-59a.

ARGUMENT

Although claiming that the court of appeals's en banc decision is "unprecedented" and "will severely disrupt the day-to-day administration of justice in the District of Columbia federal courts" (Pet. 12), petitioner fails to clearly state how the D.C. Circuit's construction of Rule 404(b) is erroneous or how it prejudices the government's legitimate interest since, under the

court's ruling, the prosecution cannot possibly lose on the conceded elements. As the majority observed, "concession of [the element], combined with an instruction limiting the jury's consideration to possession [of the drugs], would completely eliminate the possibility that the jury would find against the government on [the element]." Pet. App. 16a. Under the opinion below, the only "loss" to the government is the opportunity to obtain a conviction through a jury's improper use of prior bad acts evidence to draw general conclusions about a defendant's criminal propensity and general bad character. Because the prosecutor's duty is to seek justice, the government is benefitted -- not harmed -- when verdicts are untainted by these impermissible inferences. Cf. Berger v. United States, 295 U.S. 78, 88 (1935) (prosecutor may not use "improper methods calculated to produce a wrongful conviction.") Thus, the court of appeals's decision protects the integrity of criminal trials and enhances the reliability of jury verdicts.

Moreover, petitioner urges this Court to grant review to decide a question that is not presented by the decision of the court of appeals. In this regard, petitioner frames the question as whether a defense offer to stipulate to an element precludes the prosecution from introducing Rule 404(b) evidence to prove that element and entitles the defense to "obtain an instruction that the jury need not consider or decide that element." Pet. I. To the contrary, the court of appeals's decision is conditioned on the defendant's acceptance of a jury instruction directing the jury

that it must find the undisputed element. Pet. App. 11a-12a. In fact, rather than being a matter of the accused's entitlement to such an instruction, this mandatory jury instruction requirement fundamentally distinguishes the D.C. Circuit's ruling from the decisions of all other courts of appeals that have addressed the question of the effect of a defendant's offer to concede an element as to which the government seeks to introduce bad acts evidence.

The question presented by petitioner obscures the aspect of the court of appeals's holding that makes it novel -- that bad acts evidence will be rendered inadmissible only if the defendant waives his right to have the government prove each element beyond a reasonable doubt and agrees to a directed verdict on the particular elements for which the prosecution seeks to introduce the evidence. In the majority's own words,

> As we see it, a defendant's offer to concede knowledge and intent combined with an explicit jury instruction that the Government no longer needs to prove either element gives the Government everything the evidence could show with respect to those two elements, doing so without risk that the jury will use the evidence for impermissible propensity purposes.

Pet. App. 9a-10a.

Petitioner claims that the courts of appeals are "deeply divided" on this issue. Pet. 10-12. However, the claimed circuit split is more apparent than real. The dispute in the other circuits actually centers on the adequacy of a defense offer to stipulate to a particular factual issue and the effect of that offer on the admissibility of bad acts evidence in light of the

government's burden to prove each element beyond a reasonable doubt. There is a significant difference between offering to stipulate to facts underlying an element and agreeing to a directed verdict on that element. The combination of the "must convict" jury instruction and the defendant's waiver of a trial on the uncontested elements, both of which are required by the decision below, entirely eliminates any risk to the government that the jury will fail to find the required element. No other circuit has ruled on the effect of such a full waiver and mandatory instruction on the admissibility of 404(b) evidence.

Most of the cases admitting bad acts evidence where a defendant offers to concede an element can be read as holding only that the mere failure to affirmatively contest the element is insufficient, or that the particular stipulation offered was inadequate to remove the element from dispute. See, e.g., United States v. Jemal, 26 F.3d 1267, 1274 (3d Cir. 1994) (offer to stipulate to intent and knowledge inadequate); United States v. Garcia, 983 F.2d 1160, 1173-76 (1st Cir. 1993) (offer to concede intent adequate but concession of knowledge not sufficiently clear and unequivocal). Petitioner points to no decision that has held a defendant's unequivocal offer to concede an element is irrelevant to the admissibility of extrinsic evidence to prove that element.[1]

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[1]Petitioner's citation to United States v. Ponce, 8 F.3d 989, 993 (5th Cir. 1993), for the proposition that generally a party may not preclude his adversary's evidence by an offer to stipulate, is unpersuasive because the court there recognized that in the context of extrinsic evidence, the probative value of bad acts evidence (continued...)

The court of appeals decided this case on very narrow grounds. Contrary to the Rule 403 balancing approach taken by many courts,[2] the decision below is "grounded" in Rule 404(b), which "establishes a separate standard for bad acts evidence precisely because in the absence of such a standard, juries might use the evidence to make propensity inferences." Pet. App. 20a. Moreover, the decision is limited to the elements of intent and knowledge and does not cover other Rule 404(b) factors, such as motive, opportunity, preparation, plan, identity, or absence of mistake or accident. Pet. App. 14a-15a. This case clearly turns upon its own unique facts -- the combination of an unequivocal and complete defense concession with a jury instruction that the jury "must convict" if it finds the contested element. As Judge Rogers's concurring opinion points out, "the court finds no opinion that involves or requires a 'must convict' instruction." Pet. App. 30a n.8. In any event, to the extent that other circuits have adopted different approaches to the broader question of the effect of defense offers

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[1](...continued)
could be substantialy outweighed by its prejudicial impact if the defendant proposed a "proper" stipulation and jury instruction. Id. at 993.

[2]This approach considers a defense offer to concede an element as part of the Rule 403 balancing in determining whether the unfair prejudice of bad acts evidence substantially outweighs any probative value. See Pet. App. 8a (collecting authorities from Third, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits). Rather than developing a bright line rule as to how the balancing decision should be made, these circuits leave it to the district courts to decide on a case-by-case basis, weighing the prejudicial impact of the bad acts evidence and the government's need for and, therefore, the degree to which the particular defense concession diminishes the probative value of, that evidence.

to concede facts underlying an element, petitioner does not rely on the claimed circuit split to argue that one approach is better than another or even that the outcome of this case would have been different if the court of appeals had simply applied a Rule 403 balancing test.[3] Once again, the petition is remarkable for what it does not say.

The respondents' acceptance of the "must convict" jury instruction makes this a relatively easy case that does not involve "a recurring and important question in the administration of the federal criminal laws." Pet. 12. The more difficult and significant cases will be those that follow this decision involving questions such as whether the "must convict" jury instruction accepted by the defendants below "could be forced on an unwilling defendant as the price of excluding prejudicial other bad acts evidence under Rule 404(b)." Pet. App. 29a (Rogers, J., concurring). The court of appeals did not have to reach such "thorny" issues in deciding this case. Id. Rather than granting review of the decision below, this Court should wait to see if other circuits adopt or reject the D.C. Circuit's ruling when they confront defense offers to accept the same mandatory jury instruction in cases perhaps raising some of the more difficult questions the court of appeals was able to bypass in this case.

Although the issue in this case involves the proper

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[3]Given the respondents' clear waiver of their right to a trial on the conceded elements and their acceptance of the "must convict" jury instruction, the result of this case likely would have been the same under any circuit's approach.

construction of Rule 404(b), petitioner's argument that the decision below is erroneous does not rely either on the text of the rule or on any significant government interest. In fact, petitioner fails to make any meaningful substantive arguments in support of its petition. Instead, petitioner devises various hypertechnical problems with the majority's approach.

For example, petitioner's first contention is that the court of appeals's ruling permits criminal defendants to enter "partial Alford pleas." Pet. 12 & n.4 (citing North Carolina v. Alford, 400 U.S. 25 (1970)). Having devised the concept of "partial Alford pleas," petitioner syllogistically argues that such a procedure finds no support in the law. Pet. 12. Petitioner's argument is flawed in several respects.

First, although it is clear that a criminal defendant has the constitutional right to demand that the prosecution prove beyond a reasonable doubt all elements of the crime charged, United States v. Patterson, 432 U.S. 197, 210 (1977), a defendant can give up the right to a trial on a particular element, provided that such a waiver is knowing and voluntary. The majority's approach requires that the defense waiver be knowing and voluntary. See Pet. App. 12a-13a (citing Brady v. United States, 397 U.S. 742, 748 (1970)).

Second, petitioner mischaracterizes as a "partial Alford plea" the majority's acceptance of a concession that does not require the defendant to admit that he was the one who committed the conceded elements of the offense. Pet. 12 n.4. However, as the majority noted:

> That [the defendant] conceded that the person with the drugs knew what they were and intended to distribute them, rather than conceding more particularly that he had such knowledge and intent, does not undermine the concession . . . because [the defendant's] position was that he did not possess the drugs at all, he could not have conceded the he knew what the substance was or that he intended to distribute the drugs. By conceding that the person with the drugs had knowledge of what they were and had the intent to distribute them and thus conceding that he had the knowledge and intent to distribute if the jury were to find that he possessed the drugs, [the defendant] clearly conveyed that the only remaining element was whether he possessed the drugs.

Pet. App. 13a-14a (emphasis in original). Thus, the majority's approach does not transmogrify a clear and unequivocal concession of an element into a "partial Alford plea."

Finally, to the extent respondents' acceptance of the burden-removing jury instruction is in effect a partial guilty plea to the uncontested elements, the decision below is not inconsistent with the district court's discretionary right to reject a guilty plea. Pet. 12. Just as a court may reject a plea in the exercise of its sound discretion, Santobello v. New York, 404 U.S. 260, 262 (1971) (additional citation omitted), a trial court can exercise the same discretion in rejecting a defense offer to concede an element where the offer is not unequivocal and does not include a knowing and voluntary acceptance of the requisite "must convict" jury instruction. See Pet. App. 11a. Moreover, since the government has no right to prevent a defendant from waiving his right to trial and entering a full guilty plea, the prosecution also cannot preclude a defendant from knowingly and voluntarily waiving his

right to have the government prove a particular element beyond a reasonable doubt.

Petitioner claims that the decision below will cause disruption in the District of Columbia federal trial courts. Pet. 12-14. To the contrary, by obviating the introduction of often time-consuming and unfairly prejudicial extrinsic evidence to prove a fact that is completely uncontested, the majority's approach should result in a more -- not less -- efficient and fair administration of justice through shorter, better focused, and less expensive trials, without the risk that juries will convict based on impermissible criminal propensity inferences. Moreover, the court of appeals's decision is consistent with established law and practice regarding guilty pleas, directed verdicts, and stipulations. Under the majority's ruling, trial courts will perform their traditional functions in requiring that a defendant's concession of an element be unequivocal and complete and in fashioning clear and conclusive jury instructions. Petitioner provides no good reason to expect that district courts will have difficulty in exercising their discretion in these areas.

Petitioner's contention that convictions obtained in the District of Columbia federal courts in cases applying the court of appeals's decision may be subject to collateral attack is simply wrong. Pet. 13-14. The government argues that "because other courts of appeals believe that a defendant's concession of an element <u>never</u> authorizes the district court to remove that element from the jury's consideration [citation omitted]," convictions

secured under the ruling below "may remain under a shadow" (Pet. 13) (emphasis in original). However, by requiring the defendant to agree to a directed verdict on the uncontested elements, the majority's approach renders inapposite petitioner's citations (Pet. 13-14) holding that a defendant's tactical decision not to contest the facts underlying an element (Estelle v. McGuire, 502 U.S. at 69)[4], or a defendant's agreement to enter into a factual stipulation (United States v. Muse, 83 F.3d 672, 679-80 (4th Cir.), cert. denied, 117 S. Ct. 261 (1996)), does not authorize a trial court to remove the element from the jury's consideration. Because under the court of appeals's decision the defendant knowingly and voluntarily waives his constitutional right to have the government prove all of the elements (Pet. App. 12a-13a), such a defendant will not be able to collaterally attack his conviction on the grounds that the district court erroneously removed an element from the jury's consideration. Therefore, contrary to petitioner's assertion, this Court's intervention is not necessary to resolve any constitutional "uncertainty" created by the decision below. Pet. 14.

Contrary to petitioner's claim, the court of appeals's

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[4]Petitioner's reliance on Estelle is misplaced for two additional reasons. First, the accused in that case did not even offer to concede the element that the prosecution sought to prove through bad acts evidence. Therefore, the case is clearly distinguishable on its facts. Second, in Estelle, which involved a collateral attack on a state conviction, this Court addressed the constitutional question of whether the admission of battered child syndrome evidence violated the accused's due process rights. Thus, the admissibility of the evidence under the Federal Rules of Evidence was not implicated in the Court's decision.

decision does not allow a defendant to be convicted "even though there are one or more elements of the offense as to which the government has not been permitted to introduce evidence, the defendant has made no true admission, and the jury has found no pertinent facts." Pet. 14. In fact, quite the opposite is true. Under the decision below, the government is permitted to introduce any intrinsic evidence to prove its case, the defendant is required to make a clear and unequivocal admission to the uncontested elements (Pet. App. 13a-14a) (noting that defendant's concession that "the person" who possessed the drugs had the requisite knowledge and intent constituted admission that the defendant had such knowledge and intent if the jury found that he was "the person" who possessed the drugs), and the jury is instructed that it must find the uncontested elements as proven.

Finally, petitioner's claim that the decision below will be disruptive has no historical support as a similar rule has been in effect for some seventeen years in the Second Circuit. See, e.g., United States v. Mohel, 604 F.2d 748, 753-54 (2d Cir. 1979) (unequivocal stipulation to elements that includes jury instruction that jury "may" convict if it finds contested elements proven beyond a reasonable doubt, requires exclusion of extrinsic evidence to prove uncontested elements). Petitioner cites no evidence that district courts in the Second Circuit have had any difficulty in administering this long-standing rule. Because the decision below is much more narrowly drawn in that it entirely removes the government's burden to prove the conceded elements by requiring

acceptance of a mandatory "must convict" jury instruction, federal trial courts in the District of Columbia should experience no difficulty in administering it.

CONCLUSION

Petitioner strains to find a legitimate reason for this Court to review the court of appeals's decision but in the end, there is none. The decision below turns upon its own unique facts and is legally correct. Because of respondents' acceptance of a directed verdict on the uncontested elements, the D.C. Circuit was able to decide this case on very narrow grounds and the government points to no appellate decision conflicting with this limited holding. Moreover, the complete absence of any explanation as to how the majority's approach possibly could prejudice the prosecution's presentation of its case speaks volumes. The court of appeals's decision gives the government everything it legitimately could want without providing the defense with any tactical advantage, while properly protecting against the danger of unfair prejudice inherent in bad acts evidence. By ensuring fairer and more efficient trials, the court of appeals's decision will enhance, rather than impede, the administration of criminal justice in federal courts. For these reasons, the petition should be denied.[5]

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[5]Respondents agree with petitioner's position that because the issues in Old Chief v. United States, No. 95-6556 (argued October 16, 1996), are inapposite, the resolution of that case should not affect the Court's disposition of this petition. Pet. 14-16.

Respectfully submitted,

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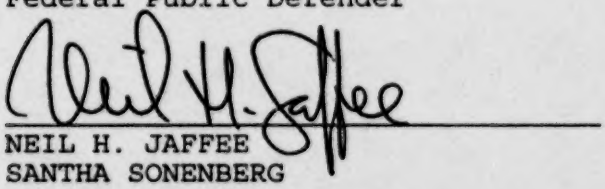

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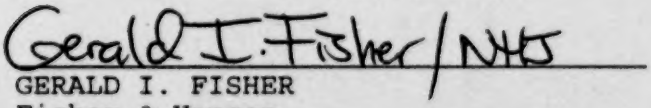

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CERTIFICATE OF SERVICE

Neil H. Jaffee, a member of the bar of this Court, certifies that pursuant to Rule 29 of this Court, he filed and served the within BRIEF FOR RESPONDENTS IN OPPOSITION on counsel for petitioner by depositing copies of said opposition, in the United States Mail, first-class mail, postage prepaid, at Washington, D.C., on December 9, 1996, within the time allowed for filing.

Service was made upon counsel for petitioner at the following address: Honorable Walter Dellinger, Acting Solicitor General, United States Department of Justice, 10th Street and Constitution Avenue, N.W., Room 5614, Washington, D.C. 20530.

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